Filed 3/2/10 P. v. Thibes CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LINDOLFO THIBES,<br><br>Defendant and Appellant. | B215688<br><br>(Los Angeles County<br>Super. Ct. No. BA340193) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Lindolfo Thibes (appellant) of five counts of forcible sodomy (counts 2, 4, 6, 8, 15; Pen. Code, § 286),[1] five counts of forcible oral copulation (counts 3, 5, 7, 9, 16; § 288a), and five acts of forcible rape (counts 13, 14, 17, 18, 19; § 261).[2] The jury also found true the allegation that appellant inflicted great bodily injury on the victim as to counts 13, 18, and 19. (§ 667.61, subd. (a).) The trial court sentenced appellant to 109 years to life in state prison.

On appeal, appellant argues that the trial court committed reversible error by: (1) instructing the jury on CALCRIM No. 1120, and (2) denying appellant's request for advisory counsel. We affirm.

## FACTS

The victim is appellant's biological daughter. When the victim was six years old, appellant engaged in the following acts: he touched her buttocks and vagina, licked her vagina, and forced her to touch his penis and perform oral sex on him. When the victim turned seven years old, appellant began vaginally and anally penetrating her. These acts occurred two to three times a week when the victim's mother worked as an overnight babysitter for another family. Also, when the victim was seven or eight years old, appellant provided her with alcohol and marijuana. Appellant later provided the victim with powder cocaine on multiple occasions.

When the victim was 11 or 12 years old, appellant prohibited her from attending school. School officials came looking for the victim, which prompted appellant to take the victim to New York and Miami for an extended period of time. When the victim was 14 or 15 years old, appellant provided the victim with methamphetamines.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The jury also found appellant guilty of five counts of continuous sexual abuse of a child under 14 years of age (counts 1-5; § 288.5), and two additional counts of forcible rape (counts 11-12; § 261). As to these counts, however, the prosecution conceded that the statute of limitations had expired. Accordingly, the trial court dismissed them prior to sentencing.

Appellant continued penetrating the victim's mouth, vagina, and anus for a number of years.[3] The penetration occurred almost everyday and sometimes three to four times a day. Appellant told the victim that if she reported his actions, he would kill her, blind her, or cut off her fingers. Appellant repeatedly beat the victim with a baseball bat and wooden karate sticks. On one occasion, appellant struck the victim's feet over 50 times, which left her unable to walk temporarily. When the victim begged appellant to leave her feet alone, he would strike her knees and elbows instead. The victim lived in a constant state of fear. On two occasions, the victim had sex with other men in order for appellant to watch.

Appellant impregnated the victim four times, resulting in the birth of three children. The victim gave birth to the first child when she was 17 years old, the second child when she was 21 years old, and the third child when she was 24 years old. The fourth pregnancy was aborted. When the victim was six or seven months pregnant with one of the children, appellant tied her to the back of a chair and suffocated her until she passed out.

In 2005, when appellant and the victim were living in Nevada, appellant stabbed the victim twice in her chest with a large kitchen knife. The victim was hospitalized with a collapsed lung and internal bleeding. After emerging from surgery, the victim reported the years of abuse to law enforcement authorities.

Torrance Police Officer Richard Carr obtained DNA samples from the victim and her three children. A DNA sample was also obtained from appellant. John Bockrath (Bockrath), senior criminalist for the Los Angeles County Sheriff's Department Scientific Services Bureau, tested the DNA samples to determine the paternity status of the victim and her three children. Based on the results of his testing, Bockrath concluded that appellant was the biological father of the victim and her three children.

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**3** The record is silent as to the whereabouts of the victim's mother during this time period.

## DISCUSSION

### I. Jury Instruction

#### *A. Appellant's Argument*

Appellant argues that CALCRIM No. 1120, the instruction that sets forth the elements for the offense of continuous sexual abuse of a person under 14 years of age (§ 288.5, subd. (a)),[4] provides an incorrect statement of the law and thus, the trial court committed reversible error by instructing the jury with it.

#### *B. Summary of Proceedings Below*

At the close of trial, the trial court instructed the jury with CALCRIM No. 1120, as follows:

"To prove that the defendant is guilty of this crime, the people must prove that: [¶] 1. The defendant lived in the same home with a minor child; [¶] 2. The defendant engaged in three or more acts of lewd or lascivious conduct with the child; [¶] 3. Three or more months passed between the first and last acts; AND [¶] 4. The child was under the age of 14 at the time of the acts."

"Lewd and lascivious conduct is any willful touching of a child accomplished with the intent to sexually arouse the perpetrator or the child. *The touching need not be done in a lewd or sexual manner*. Contact with the child's bare skin or private parts is not

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[4] Section 288.5, subdivision (a) provides in relevant part: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in . . . three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years."

Section 288, in turn, provides in relevant part: "(a) Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."

required. Any part of the child's body or the clothes the child is wearing may be touched. Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone or gain any advantage." (Italics added.)

Appellant argues that CALCRIM No. 1120 provides an incorrect statement of the law because it states, as indicated by the italicized language above, that the touching at issue need not be done in a lewd or sexual manner. Appellant cites to section 288, which provides in relevant part: "(a) Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." Appellant focuses on the term "lewdly" in section 288 and maintains that any touching of a minor must be done in a lewd or sexual manner in order to qualify as lewd or lascivious conduct.

***C. Relevant Authority***

Appellant's argument was squarely rejected by the Supreme Court in *People v. Martinez* (1995) 11 Cal.4th 434 (*Martinez*). In *Martinez*, the defendant was charged under section 288 with committing lewd and lascivious acts against two 13-year-old girls. In the first incident, the defendant approached the minor, hugged her tightly, and tried to kiss her on the lips. In the second incident, the defendant placed one arm around the girl's shoulders and hugged her as he pushed her a substantial distance away from her school. (*Martinez*, *supra*, at pp. 439–440.) The defendant argued that the trial court committed reversible error by instructing the jury that a lewd or lascivious act was "'any touching'" of a minor with the intent to arouse, appeal to, or gratify the sexual desires of either party. (*Id*. at p. 440.) According to the defendant, section 288 required more than just "'any touching.'" (*Martinez, supra,* at p. 440.) Rather, the touching in question had to be done in an "inherently 'sexual'" or "inherently lewd" manner. (*Id*. at pp. 441–442.) The Supreme Court rejected the defendant's argument, stating that "[a]ny attempt to

parse this venerable statute [section 288] in the manner urged by defendant is not supported by its language, context, purpose, and long-settled construction." (*Id.* at p. 442.) The Court affirmed the long-standing principle that "section 288 prohibits *all* forms of sexually motivated contact with an underage child" regardless of the "form, manner, or nature of the offending act[.]" (*Id.* at p. 444.)

The Supreme Court has reaffirmed its holding in *Martinez* in subsequent cases. (See *People v. Lopez* (1998) 19 Cal.4th 282, 289 ["*Any* touching of a child under the age of 14 violates [section 288], even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the *intent* to arouse or gratify the sexual desires of either the perpetrator or the victim"]; *People v. Warner* (2006) 39 Cal.4th 548, 558 [same].)

***D. Analysis***

As *Martinez* and subsequent cases make clear, *any* touching of a minor constitutes lewd and lascivious conduct if it is done with the intent to arouse or sexually gratify the defendant or the child, even if the touching itself is not done in a lewd or sexual manner. Thus, CALCRIM No. 1120 provides a correct statement of the law when it states that the touching in question need not be done in a lewd or lascivious manner so long as it is done with the intent to arouse the perpetrator or the child. There simply was no instructional error in this case.

Assuming for argument, however, that the trial court erred by instructing the jury on CALCRIM No. 1120, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) There was ample evidence that appellant touched the victim in a lewd and lascivious manner. When she was six and seven years old, appellant repeatedly touched, licked, and penetrated the victim's buttocks, vagina, and anus. He also forced her to touch his penis and perform oral sex on him. Appellant presented no evidence to the contrary. Thus, even if the jury had been instructed that it could only convict appellant of continuous sexual abuse of a child under 14 years of age

if the touching in question was done in a lewd or lascivious manner, the jury would have undoubtedly found appellant guilty of that offense.[5]

## II. Advisory Counsel

### *A. Appellant's Argument*

Appellant argues that the trial court committed reversible error by denying his request for advisory counsel.

### *B. Summary of Proceedings Below*

On November 16, 2007, the trial court granted appellant's request to proceed in propria persona. On January 18, 2008, appellant requested the appointment of standby counsel. The trial court granted the request and explained to appellant that standby counsel would sit in on the proceedings and take over if appellant's in propria persona status was terminated. On that same date, the trial court asked appellant if he wished to continue self-representation. Appellant stated that he would relinquish his in propria persona status only if the trial court would appoint an attorney of appellant's choosing. When the trial court stated that it could not do so, appellant elected to remain in propria persona.

On February 21, 2008, during a pretrial hearing, appellant requested that the trial court appoint advisory counsel. The trial court denied the request, stating: "Mr. Thibes, there's no authority for the court to appoint advisory counsel for you. If I had the authority, I would, but I don't. I can appoint an attorney for you, and you'll have the assistance of that attorney. In other words, you would have to give up your pro. per. status and have an attorney, you know, that is appointed by the court to represent you. This is about the only way I can do it. I can't appoint an attorney to assist you in that."[6]

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**5** We note in any event that the trial court dismissed these counts against appellant.

**6** On January 21, 2009, the trial court denied a second request by appellant for advisory counsel on the same grounds. Appellant does not challenge that ruling on appeal.

In two subsequent hearings, on May 8 and June 9, 2008, the trial court explained to appellant the disadvantages of self-representation and asked appellant whether he desired to relinquish his in propria persona status. On both occasions, appellant reaffirmed his desire to proceed in propria persona.

***C. Relevant Authority***

"'Standby counsel' is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked. [Citations.] 'Advisory counsel,' by contrast, is appointed to assist the self-represented defendant if and when the defendant requests help." (*People v. Blair* (2005) 36 Cal.4th 686, 725 (*Blair*).)

The Supreme Court has "specifically held that cocounsel status, advisory counsel and other forms of 'hybrid' representation are not constitutionally guaranteed." (*People v. Clark* (1992) 3 Cal.4th 41, 111.) In other words, "'[w]hile the Sixth Amendment guarantees both the right to self-representation and the right to representation by counsel[,] . . . a defendant who elects self-representation "does not have a constitutional right to choreograph special appearances by counsel,"'" including the presence of advisory counsel. (*Blair*, *supra*, 36 Cal.4th at p. 723; see also *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162 ["A criminal accused has only two constitutional rights with respect to his legal representation, and they are mutually exclusive. He may choose to be represented by professional counsel, or he may knowingly and intelligently elect to assume his own representation"].)

"California courts have discretion to appoint advisory counsel to assist an indigent defendant who elects self-representation." (*People v. Crandell* (1988) 46 Cal.3d 833, 861 (*Crandell*) abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365.) Thus, as with other matters left to the trial court's discretion, "'as long as there exists "a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside[.]" [Citations.]'" (*Crandell, supra,* at

p. 863.) "The factors which a court may consider in exercising its discretion on a motion for advisory counsel include the defendant's demonstrated legal abilities and the reasons for seeking appointment of advisory counsel." (*Ibid*.) "Where the record supports an inference of . . . a manipulative purpose, a court might be justified in denying a request for advisory counsel." (*Ibid*.) For instance, "[w]here a defendant represented by the public defender has undertaken self-representation only after seeking appointment of private counsel and after having failed to demonstrate proper grounds for appointment of substitute counsel, a request to have private counsel appointed in an advisory capacity might evidence a manipulative endeavor to obtain the appointment of private counsel without a showing of conflict or inadequacy sufficient to remove the public defender in the first instance." (*Ibid.*)

A trial court's failure to exercise its discretion in denying a motion for advisory counsel constitutes error. (*Crandell, supra,* 46 Cal.3d at p. 863 [after a summary denial].) When such error occurs (i.e., when the trial court fails to exercise its discretion), we determine whether it would have been an abuse of discretion if the trial court had exercised its discretion and refused the request for advisory counsel. (*Id*. at pp. 862–863.) If the denial would *not* have been an abuse of discretion, then we review the trial court's error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Crandell, supra*, at pp. 864–865.)[7]

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[7] Citing *People v. Bigelow* (1984) 37 Cal.3d 731 (*Bigelow*), appellant argues for a rule of per se reversal when a trial court fails to exercise its discretion in this context. That case, however, is inapposite. In *Bigelow*, the Supreme Court held that the trial court's error in not appointing advisory counsel was reversible per se because of the unique circumstances of that case. Specifically, *Bigelow* was "a capital case" that "raise[d] complex additional legal and factual issues beyond those raised in an ordinary felony trial" and "arose under the 1978 death penalty initiative, an enactment rife with constructional and constitutional difficulties, which had not yet been judicially interpreted." (*Id*. at p. 743.) Because of "the impossibility of assessing the effect of the absence of counsel upon the presentation of the case," the Court held that the error was per se reversible. (*Id*. at p. 745.) In *Crandell*, the Court revisited the issue of how to assess prejudice from the denial of a request for advisory counsel and stated that in

The record shows that the trial court did not exercise its discretion when it denied appellant's request for advisory counsel during the February 21, 2008 hearing. When appellant requested advisory counsel, the trial court responded: "[T]here's no authority for the court to appoint advisory counsel for you. If I had the authority, I would, but I don't." It is clear from this statement that the trial court failed to exercise its discretion in denying appellant's request. The trial court summarily denied the request because it wrongly believed that it did not have the power to grant the request, and not because it deemed appellant's request unmeritorious.

The record, however, supports the inference that if the trial court had exercised its discretion in denying the motion, such exercise would not have been an abuse of discretion. Appellant was originally represented by a public defender. In November 2007, he undertook self-representation. In January 2008, appellant requested that the trial court appoint an attorney of appellant's own choosing. After the trial court explained that appointed counsel would not be of appellant's own choosing, appellant elected to remain in propria persona. Appellant then requested advisory counsel. These circumstances, as explained in *Crandell*, suggest a "manipulative endeavor to obtain the appointment of private counsel without a showing of conflict or inadequacy sufficient to remove the public defender in the first instance." (*Crandell*, *supra*, 46 Cal.3d at p. 863.) Thus, it would not have been an abuse of discretion for the trial court to deny appellant's request for advisory counsel.

Given that it would not have been an abuse of discretion for the trial court to have denied appellant's request for advisory counsel, we now turn to the prejudicial effect of the trial court's failure to exercise its discretion in the first place. Contrary to appellant's assertions in his opening brief, appellant proved to be a competent advocate on his own behalf. Throughout the lengthy proceedings, he filed multiple motions, including motions to dismiss the information, motions to dismiss various counts, motions to compel

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non-capital cases, such as the present case, "*Bigelow* is distinguishable and its rule of per se reversal does not govern." (*Crandall*, *supra*, 46 Cal.3d at p. 864.)

discovery, motions for expert witness funds, motions to exclude evidence including the results of DNA testing, and requests for judicial notice. These motions were cogent and were supported by legal authorities. Although most of appellant's motions were denied, he obtained several successes during the proceeding. For instance, after appellant argued multiple times that the statute of limitations had expired on various counts, the prosecution conceded that the limitations period for counts 1 though 5, 11, and 12 had expired. This concession resulted in the dismissal of those counts against appellant. Additionally, appellant successfully requested funds to hire two defense investigators and a DNA expert to challenge the results of the paternity tests.

Furthermore, appellant aggressively cross-examined the victim during trial and managed to launch several attacks on her credibility. For instance, he suggested through cross-examination that the victim had been convicted of a felony, that she was an abusive mother and her children had become wards of the court, that she had multiple sex partners as a minor, that those sex partners, and not appellant, fathered her children, that she had "group sex with gangsters," that she lied about her injuries, and that she lied about the sexual abuse that took place. At the close of trial, appellant submitted a brief on proposed jury instructions. After the jury issued its verdict, appellant filed a motion to stay execution of the judgment.

In his opening brief, appellant cites to various statements he made during pretrial and trial proceedings that purportedly show he had "tremendous difficulties" communicating with the trial court. Likewise, in his reply brief, appellant argues that he "was just not making sense in his arguments to the court." We disagree with appellant's characterizations of his communications with the court. The record as a whole demonstrates that appellant made cogent arguments on his behalf and represented himself competently.

In sum, because it is not reasonably probable that appellant would have achieved a more favorable result had advisory counsel been appointed, any error in denying his

request does not compel reversal of the judgment. (*Crandell*, *supra*, 46 Cal.3d at pp. 864–865.)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST